

COMPLIANCE BOARD OPINION No. 97-6
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April 29, 1997

Kathryn Mann, President
Gregory K. Fries, Vice President

The Open Meetings Compliance Board has considered your complaint of February 14, 1997, in which you asserted that Howard County Zoning Board violated the Open Meetings Act at a meeting held on January 8, 1997. For the reasons set forth below, the Compliance Board finds no violation.

I

Complaint and Response

As we understand it, your complaint asserts that the Zoning Board of Howard County (“Zoning Board”) violated the Open Meetings Act by going into closed session to discuss two issues: whether Howard County’s zoning regulations require separate petitions, one for a zoning map change and another for a preliminary development plan; and whether it was inconsistent with zoning regulations and precedents for these two issues to be taken up at a single hearing, instead of a bifurcated hearing. More specifically, you complain that the Zoning Board improperly voted on the bifurcation issue in closed session.

In a timely response on behalf of the Zoning Board, Darrell R. Drown, Zoning Board Chairperson, stated that the Zoning Board did not violate the Act. The meeting was properly closed, Mr. Drown asserts, for consultation with legal counsel and consultation with staff, consultants, or other individuals about pending or potential litigation. Moreover, the vote on the bifurcation issue was taken in an open — albeit unattended — session:

The Board believes it took a vote on the issue in open session in the Board’s conference room on January 8, 1997, after it had discussed the issue in closed session with legal counsel.... According to my memory, and to that of the Board’s legal counsel, we did open the doors of the conference room after the conclusion of the discussions with legal counsel before the vote was taken, but no one was outside of the room waiting to gain entrance to witness the vote. Because the Board was due to commence a public hearing in the Bancker Room (a large public hearing room adjacent to the

Board's offices and conference room) on an unrelated zoning matter, the Board voted on the bifurcation request and proceeded to commence the hearing in the Banneker Room on the other matter.

Mr. Fries ... asked the Board's legal counsel, Paul Johnson, ... as to the Board's decision on the bifurcation request, Mr. Johnson so informed him. Mr. Johnson also informed a newspaper reporter ... of the Board's decision at that time.

II

Analysis

In order to close a meeting within the scope of the Act, a public body must begin its meeting in open session so that a vote may be taken and the required written statement may be issued. §10-508(d) of the State Government Article. *See* Compliance Board Opinion 93-2 (January 7, 1993).¹ The public body may hold the closed session only if the motion is supported by a majority of members present and voting. §10-508(d). The Zoning Board stated that it voted 5-0 to close the meeting on January 8 to consult with legal counsel, §10-508(a)(7), and to discuss "pending or potential litigation." §10-508(a)(8).

Under §10-508(a)(7), a public body may meet in closed session to "consult with counsel to obtain legal advice" and, under §10-508(a)(8), to discuss "pending or potential litigation." The Zoning Board indicates that it met in closed session with its counsel to seek advice whether a bifurcated hearing was required. As your complaint makes clear, the proposed development to which the procedural dispute related is a very controversial one. The Zoning Board could reasonably conclude that it needed detailed legal advice about this procedural issue. Furthermore, any legal misstep on its part would likely be the subject of a suit by those dissatisfied by the Zoning Board's ultimate decision on the merits. Under these circumstances, the Compliance Board finds that the Zoning Board properly closed the meeting.

The second issue is whether the Zoning Board took an action in closed session — voting on the procedural issue — that was required by the Act to have been done in open session. As the Attorney General has pointed out, "Once the legal advice is obtained, the public body may not remain in closed session." *Open Meetings Act Manual* 20 (2d ed. 1995). The Zoning Board states that it believes that a vote on the issue of whether to bifurcate the hearings was indeed taken in

¹ In general, this requirement does not apply to "executive" or "quasi-judicial" functions, which are excluded from the act. §10-503(a)(1). Notwithstanding this exclusion, however, any zoning matter is subject to the Act's requirement. §10-503(b)(2).

open session in the Board's conference room on January 8, 1997, after it had discussed the issue in closed session with legal counsel.²

Compliance Board precedent requires nominally open meetings to be conducted in such a way that members of the public recognize the meeting to be open. In other words, an open door does not satisfy the Act's requirement if other circumstances — an unusual meeting site, for example — pose a barrier to the public's awareness of, and presence at, the meeting. *See* Compliance Board Opinions 96-4 (May 1, 1996), 94-6 (August 16, 1994), and 93-8 (July 16, 1993).

The facts here do not suggest that the public's opportunity to observe the Zoning Board's vote was in practice frustrated. If the memories of the participants are correct, the vote was taken in the conference room, the place where interested members of the public knew that the Zoning Board was holding its closed session. Unless the Zoning Board had done something to suggest to the public that any further open session would be moved to the larger Banneker Room, the Zoning Board was not required to refrain from voting in its conference room. Moreover, the Zoning Board's immediate disclosure of its vote to Mr. Fries and to a reporter suggests that it was not attempting to hide anything by conducting its vote in the conference room.

III

Conclusion

The Compliance Board finds no violation of the Open Meetings Act arising from the January 8, 1997 meeting held by the Zoning Board.

OPEN MEETINGS COMPLIANCE BOARD

Walter Sondheim, Jr.
Courtney McKeldin
Tyler G. Webb

² After this complaint was filed, the Zoning Board decided to take another vote on the issue of bifurcation in public session on March 10, 1997, "to simply put the issue to rest." The Zoning Board voted 4-1 not to bifurcate the hearings. The results of the March 10 vote were the same as the vote held on January 8.